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Legislative Notice

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S. 1692 — Partial-Birth Abortion Ban Act of 1999

Calendar No. 300

Introduced by Senator Santorum on October 5, 1999, read the second time and placed on the calendar on October 6. No report.

NOTEWORTHY

- The Senate is expected to begin consideration of S. 1692 this week. S. 1692 was introduced on October 5, 1999, by Senator Santorum with 43 cosponsors; it was read twice and placed on the Calendar on October 6. (An identical bill, S. 928, was introduced on April 29, 1999 and is pending in the Committee on the Judiciary.)

- With the Senate's consideration of S. 1692, this will be the third consecutive Congress to take action on partial-birth abortion legislation. In both the 104th and 105th Congresses, partial-birth abortion bans were approved by large majorities in each house but were vetoed by President Clinton. Following each of the two vetoes, the House of Representatives overrode but the Senate failed to do so. (See "Overview of Legislative History" under *Background*, page 3, below.) President Clinton has promised to veto S. 1692 when it reaches his desk.

- S. 1692 prohibits "partial-birth abortion" — defined in the bill as "an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery" — unless performance is "necessary to save the life of a mother whose life is endangered by a physical disorder, illness, or injury."

- Possible amendments include a Durbin substitute based on the "Late-Term Abortion Limitation Act" (S. 2497) he introduced in the 105th Congress, which purports to ban abortions of a "viable fetus" under certain circumstances. However, RPC concludes that this measure, which is expected to receive the support of the Clinton White House, would not effectively bar any abortions whatsoever. (See Possible Amendments, page 10, below.) The intent and effect of the possible Durbin substitute is very similar to that of the Daschle substitute rejected by the Senate during consideration of the partial-birth abortion ban in 1997.

- In recent years, some 30 states have enacted their own partial-birth bans. Of these state statutes (some of which differ markedly from S. 1692) most have been enjoined from enforcement by court order pending final determination of their constitutionality. None of the state partial-birth abortion laws has yet been reviewed by the Supreme Court of the United States.

HIGHLIGHTS

- S. 1692 prohibits the performance of partial-birth abortions, which are defined in the bill as abortions "in which the person performing the abortion partially vaginally delivers the living fetus before killing the fetus and completing the delivery."

- According to this definition, the prohibition established in S. 1692 would *not* apply to (1) abortions performed by C-section or hysterotomy (i.e., where the fetus is not extracted vaginally), nor to (2) abortions in which the fetus is killed *prior* to being moved into the birth canal.

- The person performing such an abortion would be subject to fines or imprisonment of up to two years, or both. The mother of the aborted fetus is explicitly exempted from prosecution. In addition, the person performing the abortion is liable for civil damages to the father of the aborted child and, if the mother is under 18 years old, the maternal grandparents of the child.

- The prohibition does not apply to a partial-birth abortion that is "necessary to save the life of a mother whose life is endangered by a physical disorder, illness, or injury."

- During the 104th Congress, the 12-physician Council on Legislation of the American Medical Association (AMA) voted unanimously to recommend to the AMA's Board of Trustees that they endorse the partial-birth abortion ban. On May 19, 1997, the AMA's Executive Vice President, P. John Seward, MD, wrote to Senator Santorum expressing the AMA's support for H.R. 1122, as amended, (letter available from RPC); the AMA has taken no further public position on the legislation.

- Both now and in the two previous Congresses, a particular point of debate has been the number of partial-birth abortions that are performed and the medical or social reasons for them. Organizations opposing the bill, as well as President Clinton, have repeatedly claimed that only a few hundred partial-birth procedures take place each year, only in the third trimester of pregnancy, most if not all of which are based on extreme circumstances of fetal deformity or danger to the mother. However, these claims have been contradicted by press accounts indicating that thousands of partial-birth abortions take place yearly, the large majority occurring in the second trimester, and that these are performed for elective (i.e., non-medical) reasons. In addition, in February 1997 a noted spokesman for an abortionists' professional organization admitted that he had knowingly misrepresented the frequency of partial-birth abortion in supporting the "party line" against the bill. (For further details, see below, page 5, "Numbers of Partial-Birth Abortions.") One of the two leading practitioners of the abortion technique prohibited by this bill claims that 80 percent of the partial-birth abortions which he performs are "purely elective." Finally, recent documentation regarding survivors of partial-birth abortion highlight the falsity of the claims of defenders of the procedure. (See "Survivors of Partial-Birth Abortion," page 8, below.)

BACKGROUND

Senate consideration of S. 1692 will mark the third time Congress has taken action on partial-birth abortion legislation since 1995. Since that initial consideration, the facts of the gruesome procedure (described below) have not changed, nor have the demonstrably false assertions made by the Clinton White House in an effort to justify its continued legality.

The following provides an overview on issues relevant to the Senate's consideration of S. 1692, including:

- An overview of the legislative history of the partial-birth abortion ban, including a summary of the status of state legislation;
- Background on the procedure itself;
- Background on the falsity of the claims made by President Clinton in his veto messages; and
- Recent information relating to infants that have survived partial-birth abortions.

Overview of Legislative History

S. 1692 is identical to the bill passed by Congress but vetoed by President Clinton during the 105th Congress (H.R. 1122, as amended, H. Rept. 105-24; S. 6) and differs only in minor detail from the bill passed and vetoed in the 104th Congress (H.R. 1833, H. Rept. 104-267; S. 939). The specifics are as follows:

105th Congress: H.R. 1122 passed the Senate on May 20, 1997, with amendments, by a vote of 64-36. On October 8, 1997, the House (which had originally passed the bill on March 20, 1997, by a vote of 295-136) agreed to the Senate amendments by a vote of 296-132 and sent the bill to President Clinton, who vetoed it and returned it to the House (which was the originating house). On July 23, 1998, the House overrode the President's veto by a margin of 296-132 (two-thirds of those present and voting is required) and sent the veto message to the Senate. On September 18, 1998, the Senate vote to override failed, 64 to 36 (three votes short of the necessary margin).

104th Congress: President Clinton vetoed H.R. 1833 on April 10, 1996. The veto override vote succeeded in the House (285 to 137) on September 19, 1996, but failed in the Senate (58 to 40) on September 26; the measure initially had been approved by the Senate on December 7, 1995, by a vote of 54 to 44.

In addition to the federal legislative efforts summarized above, 30 states have enacted partial-birth abortion ban statues. Legal challenges have been raised in 21 states, in 18 of which federal courts have issued injunctions or restraining orders blocking enforcement. On September 14, 1999, the Fourth U.S. Circuit Court of Appeals approved enforcement, pending appeals of Virginia's partial-birth abortion ban, staying an earlier injunction against enforcement issued by a

federal district court. Conversely, on September 24, 1999, the Eighth Circuit upheld lower court rulings against laws in Arkansas, Iowa, and Nebraska. Appeals are continuing in a number of cases, and it is expected that a definitive ruling on the constitutionality of partial-birth abortion prohibitions will have to await eventual consideration by the Supreme Court. [For further information see: "Va. Cleared to Enforce Abortion Law; Pending Appeal, U.S. Court Allows 'Partial Birth' Ban," *Washington Post*, 9/15/99; "3 Laws Banning Type of Late-Term Abortion Rejected," *Washington Post*, 9/25/99; and "Abortion-Method Ruling May Spur Supreme Court," *New York Times*, 9/26/99.]

Background on the Partial-Birth Abortion Procedure

Partial-birth abortion, the procedure prohibited under S. 1692, is a method that is employed from approximately the mid-point in pregnancy (i.e., after about 20 weeks' gestation) up to the time of delivery. On June 16, 1995, the *Los Angeles Times* described the procedure as follows:

> **"The procedure requires a physician to extract a fetus, feet first, from the womb and through the birth canal until all but its head is exposed. Then the tips of surgical** [i.e., blunt curved Metzenbaum] **scissors are thrust into the base of the fetus' skull, and a suction catheter is inserted through the opening and the brain is removed."**

Removal of the brain collapses the skull and completes the extraction of the fetal body. (A pointed hollow metal tube called a trochar is sometimes used instead of scissors to puncture the skull.) The main surgical advantage of the partial-birth abortion technique, as opposed to other methods that involve the intra-uterine dismemberment of the living fetus, is its relative ease for the person performing the abortion. Dr. W. Martin Haskell, a noted proponent and practitioner of partial-birth abortions, describes his development of the procedure:

> **"D&Es** ["dilation and evacuations," i.e., live intrauterine fetal dismemberments], **the procedure typically used for later abortions, have always been somewhat problematic because of the toughness and development of the fetal tissues. . . . I kept doing D&Es because that was what I was comfortable with, up until 24 weeks. But they were very tough. Sometimes it was a 45-minute operation. I noticed that some of the later D&Es were very, very easy. So I asked myself why can't they all happen this way. You see the easy ones would have a foot length presentation, you'd reach up and grab the foot of the fetus, pull the fetus down and the head would hang up and then you would collapse the head and take it out. It was easy. At first, I would reach around trying to identify a lower extremity** [i.e., a foot] **blindly with the tip of my instrument. I'd get it right about 30-50 percent of the time. Then I said, 'Well gee, if I just put the ultrasound up there I could see it all and I wouldn't have to feel around for it.' I did that and sure enough, I found it 99 percent of the time. Kind of serendipity."** ["2nd Trimester Abortion: An interview with W. Martin Haskell, MD," *Cincinnati Medicine*, Fall 1993]

With respect to current law, it is essential that the procedure be completed *before* the fetus' head leaves the birth canal; once the fetus were completely clear of the mother's body, a live delivery would have occurred and the child would be protected by existing criminal statutes.

During an interview with Dr. Haskell by the American Medical Association's *American Medical News* of July 5, 1993, when asked if the fetus is dead prior to perforation of the skull, he immediately replied: "No, it's not. No, it's really not." He then went on to qualify his response with the estimate that approximately one-third of fetuses involved in this procedure "are definitely dead" due to "various numbers of reasons" and that "probably the other two-thirds are not." In testimony before the House Judiciary Subcommittee on the Constitution on June 15, 1995, Professor Robert White, Director of the Division of Neurosurgery and Brain Research Laboratory at Case Western Reserve University stated that fetuses within the gestational period when this procedure is performed are "fully capable of experiencing pain."

President Clinton's False Claims on Partial-Birth Abortion

In his veto message to the House of October 10, 1997, President Clinton explained: "I am returning H.R. 1122 for exactly the same reasons I returned an earlier substantially identical version of this bill, H.R. 1833, last year." At the time of that earlier veto, he had justified his opposition to the bill passed by the 104th Congress because, he claimed, it did not contain an exception for when the partial-birth procedure would be medically necessary, specifically:

- In **"a small number of compelling cases"** (April 10, 1996, veto message, printed in the *Congressional Record*, April 15, 1996, H-3338);
- To protect the mother from **"serious injury to her health"** (April 10, 1996, veto message); and
- To avoid the mother's **"losing the ability to ever bear further children"** (May 23, 1996, press conference).

As detailed below, President Clinton's assertions are demonstrably false. According to prominent *practitioners* of partial-birth abortion:

- The procedure is not confined to a "small number of compelling cases" but is far more widespread than its defenders admit; and
- In the vast majority of cases when the partial-birth technique is used, it is not for protection of the mother's health but for elective (i.e., non-medical) purposes.

And, according to a former U.S. surgeon general and other medical authorities:

- It is *never* necessary to safeguard the mother's health or fertility.

Numbers of Partial-Birth Abortions

A major point of contention between proponents and opponents of partial-birth abortion legislation has been establishing exactly how many partial-birth abortions are performed each year. Dr. Haskell, together with another noted practitioner of the technique, Dr. James McMahon (who died in late 1995), were credited by the National Abortion Federation (a professional

association of abortion providers) with the performance of 450 partial-birth abortions per year between them. In a 1992 article, Dr. Haskell referred to having performed "over 700" such abortions. Both physicians have actively promoted the partial-birth technique within the abortion industry. In general, prior to consideration of the partial-birth bill in the 104th Congress, many estimates reported in the press were based on the public claims of just these *two* prominent practitioners of the technique and the numbers they *personally* performed *per year*, without taking into account those performed by other abortionists — while supporters of the bill insisted the total number, though not known exactly, must surely be *much larger*. According to the *New York Times* of November 6, 1995, prior to the Senate's initial consideration of the bill:

> "About 13,000 of the nation's 1.5 million abortions a year are performed after 20 weeks' gestation. And only two doctors [i.e., Haskell and McMahon], who perform a total of about 450 of these abortions a year, have said publicly that this method is the safest and best. So most discussion of the proposed ban has been based on the assumption that the method is rarely used, and only by a small number of doctors. But the National Abortion Federation, which represents several hundred abortion providers, says that more doctors have recently reported that they sometimes use the method, which they call 'intact D&E [i.e., dilation and evacuation].' "

Despite such indications, groups opposed to prohibiting partial-birth abortions, along with sympathetic press reports, persisted in claiming that partial-birth abortion is rare. For example, the *New York Times* (3/28/96) reported: **"The number of procedures that meet the definition of partial birth abortion is very small, probably only 500 or 1,000 a year."**

However, during the interim between the Clinton veto and the override votes in September 1996, investigative press accounts appeared indicating that the actual number of partial-birth procedures performed in the United States was far larger than originally admitted. For example:

- As stated in the Bergen County, NJ, *The Sunday Record* (9/15/96): **"Interviews with physicians who use the method reveal that *in New Jersey alone*, at least 1,500 partial-birth abortions are performed each year."** [emphasis added]

- **"Another** [New York] **metropolitan area doctor who works outside New Jersey said he does about 260 post-20-week abortions a year, of which half are by intact D&E** [i.e., partial-birth abortion]. **The doctor, who is also a professor at two prestigious teaching hospitals, said he had been teaching intact D&E since 1981, and he said he knows of two former students on Long Island and two in New York City who use the procedure."** [*The Sunday Record*, 9/15/96]

- Based on these revelations, as well as the admission of abortion lobbyist Ron Fitzsimmons (for further details, see "The Ron Fitzsimmons Admission: 'I Lied'" RPC Legislative Notice No. 15, the Partial-Birth Abortion Ban Act of 1997, 5/13/97, page 7), it is now believed that the actual number of partial-birth abortions performed nationwide per year is at least **in the range of 3,000 to 5,000**, with only some 500 to 750 (approximately 15 percent) occurring in the third trimester [Ron Fitzsimmons, *ABC* "Nightline," February 26, 1997]. Mr. Fitzsimmons himself characterized his lying as having **"spouted the party line"** ["Head of Abortion Group Admits Lying in Interview; 'Partial-Birth' Statements Were 'the Party Line,' " *The Washington Post*, 2/27/97] and he

has called on the abortion movement to back away from **"spins"** and **"half-truths"** [*American Medical News*, 3/3/97]. A number of other organizations have made (but not retracted) claims similar to those previously made by Mr. Fitzsimmons, which he later admitted were conscious falsehoods, in defense of the procedure often referred to by its defenders as "intact dilation and evacuation" ("IDE" or "intact D&E"), "dilation and extraction" ("D&X"), or even the Orwellian "intrauterine cranial decompression" [*Los Angeles Times*, 4/2/97]. In short, the earlier misrepresentations made by Mr. Fitzsimmons were not unique but rather illustrate the sheer dishonesty that (unsurprisingly) underpins the Clinton claims.

Reasons for Partial-Birth Abortion

Likewise, the President's claim that partial-birth abortion is performed only in "compelling cases" to protect the mother from "serious injury to her health" is unsupportable. On the contrary, as abortion lobbyist Fitzsimmons admitted to the *New York Times* (2/26/97), in **"the vast majority of cases, the procedure is performed on a healthy mother with a healthy fetus."** Likewise, in his 1993 interview with *American Medical News,* noted previously, Dr. Haskell stated that with respect to his practice:

> **"I'll be quite frank: most of my abortions are elective in that 20-24 week range. . . . In my particular case, probably 20 percent are for genetic reasons. And the other 80 percent are purely elective. . . ."**

Even the category of "non-elective abortions" is subject to qualification. In materials submitted to the House subcommittee, Dr. McMahon used a highly expansive definition for "non-elective" abortions performed up to 40 weeks' gestation (i.e., full term), including "maternal depression" and maternal youth ("pediatric indications"). The same materials indicated that half of the fetuses aborted at 26 weeks by Dr. McMahon were perfectly healthy; those which he classified as "flawed fetuses" included some with conditions compatible with long life, such as nine fetuses aborted using the partial-birth procedure because of a cleft lip (a common birth defect usually correctable by surgery).

There is abundant evidence that, contrary to the claims of President Clinton and his supporters, partial-birth abortions are performed overwhelmingly on normal fetuses for elective (i.e., non-medical) purposes.

- **" 'We have an occasional amnio abnormality, but it's a minuscule amount,' said one of the doctors . . . 'Most** [of the mothers] **are Medicaid patients, black and white, and most are for elective, not medical, reasons: people who didn't realize, or didn't care, how far along they were.' "** [Bergen County, NJ, *The Sunday Record*, 9/15/96]

- **"It is possible — and maybe likely — that the majority of these abortions are performed on normal fetuses, not on fetuses suffering genetic or other developmental abnormalities. Furthermore, in most cases where the procedure is used, the physical health of the woman whose pregnancy is being terminated is not in jeopardy. . . . Instead, the 'typical' patients tend to be young, low-income women, often poorly educated or naive, whose reasons for waiting so long to end their pregnancy are rarely medical."** [*The Washington Post*, 9/17/96]

Maternal Health and Fertility

Perhaps the most emotionally charged argument used by President Clinton to justify his previous vetoes of the partial-birth abortion ban is the claim that a health exception is necessary to protect women from (in the President's words of May 23, 1996) being "eviscerated" or "ripped to shreds" — and "losing the ability to ever bear further children." This claim was roundly refuted in an op-ed ["Partial-Birth Abortion Is Bad Medicine," *The Wall Street Journal,* 9/19/96] by four specialists in OB/GYN and fetal medicine representing PHACT (Physicians' Ad Hoc Coalition for Truth), a group of over 500 doctors, mostly specialists in OB/GYN, maternal and fetal medicine, and pediatrics, including former Surgeon General C. Everett Koop, as follows:

- "Contrary to what abortion activists would have us believe, partial-birth abortion is *never* medically indicated to protect a woman's health or her fertility. In fact, the opposite is true: The procedure can pose a significant and immediate threat to both the pregnant woman's health and fertility." (original emphasis)

- The four PHACT physicians detail the nature of that threat, including forcible dilation of the cervix ***over several days*** — which illustrates that this is ***not*** a procedure used in emergency circumstances relating to the mother's life or health.

- Among the health risks of the partial-birth procedure pointed to by the PHACT physicians: intentionally and dangerously causing a breech delivery during the procedure; risking injury to the mother by forcing the scissors into the child's head while it is still in her body; and "incompetent cervix," the leading cause of future premature deliveries.

- They also deny that fetal abnormality would ever indicate partial-birth abortion to safeguard maternal health or fertility: **"In some cases, when vaginal delivery is not possible, a doctor performs a Caesarian section. But in no case is it necessary to partially deliver an infant through the vagina and then kill the infant."** That is, despite the claims of President Clinton and his supporters, ending a pregnancy does not translate into the need to kill a partially delivered fetus — as opposed to completing the delivery of a live infant.

Survivors of Partial-Birth Abortion

Two cases have been documented in which infants survived attempted partial-birth abortion procedures. In both cases, the mothers had been undergoing cervical dilation (which, as noted above, is a procedure requiring several days) preparatory to extraction and disposal of the fetus, when they experienced premature labor and sought medical care at a location other than the clinic performing the abortion. (In both known cases, the clinic in question was the Women's Med Center of Dayton in Kettering, Ohio, owned and operated by Dr. W. Martin Haskell, MD, who had claimed credit for devising the procedure and is one of its most prominent advocates. [See "Background on the Partial-Birth Abortion Procedure," page 4, above.]) In the first publicly reported survivor case, a girl of approximately 22 weeks' gestation was delivered at Bethesda North Hospital in Montgomery, Ohio, (near Cincinnati) in April 1999 but was not given any medical care in view of her prematurity and died several hours later. In the second documented case, in August of this year a girl of approximately 25 or 26 weeks' gestation was born at Good Samaritan Hospital in Dayton and is reportedly in good health. [For more details, see: "Baby Born During Abortion Procedure," *Dayton Daily News*, 8/19/99; and "Ohio Baby Survives Abortion Procedure; Late-Term Bid Ends in Premature Labor," *Washington Times*, 8/21/99.]

Apart from these reports, it is not known how many other infants may have unexpectedly been delivered alive in the preparatory stages of the partial-birth abortion procedure, and, if they were — especially if the mother sought assistance at the clinic performing the abortion rather than a health care facility — what their fate may have been.

BILL PROVISIONS

S.1692 amends Title 18 of the United States Code (Crimes and Criminal Procedure) to create a new provision (Chapter 74): "Partial-Birth Abortions: Section 1531. Partial-birth abortions prohibited."

Subsection (a)

This subsection provides that whoever, in or affecting interstate or foreign commerce, "knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than two years, or both. This paragraph shall not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, illness, or injury. This paragraph shall become effective one day after enactment."

Subsection (b)

"Partial-birth abortion" is defined as "an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery. . . . As used in this section, the term "vaginally delivers a living fetus before killing the fetus" means deliberately and intentionally delivers into the vagina a living fetus, or a substantial portion thereof, for the purpose of performing a procedure the physician knows will kill the fetus, and kills the fetus.

> [*RPC Note*: According to this definition, the prohibition established in S. 1692 would *not* apply to (1) abortions performed by C-section or hysterotomy (i.e., where the fetus is not extracted vaginally), nor to (2) abortions in which the fetus is killed *prior* to being moved into the birth canal.]

Subsection (c)

This subsection establishes a civil cause of action against a person performing an abortion in violation of this section on the part of the father of the aborted fetus, and if the mother has not attained the age of 18 years, on the part of the maternal grandparents of the aborted fetus. Civil relief may include "money damages for all injuries, psychological and physical, occasioned by the violation" and "statutory damages equal to three times the cost of the partial-birth abortion." Civil relief is not available if the pregnancy is the result of the plaintiff's criminal misconduct (e.g., where the father had impregnated the mother by rape, or where the maternal grandfather had impregnated the mother by incest) or if the plaintiff had consented to the abortion.

Subsection (d)

This subsection consists of a broad grant of immunity to the mother against any action arising out of the performance of the partial-birth abortion.

ADMINISTRATION POSITION

President Clinton repeatedly has threatened to veto any legislation banning partial-birth abortion and has acted upon that threat in the two previous Congresses.

COST

No cost estimate for S. 1692 is available, but during consideration in the 105th Congress, CBO estimated that "enacting this legislation would have no significant impact on the federal budget" [H. Rept. 105-24, page 25].

POSSIBLE AMENDMENTS

It is anticipated that Senator Durbin will offer an amendment in the form of the substitute similar to the bill he introduced last year (S. 2497), the "Late-Term Abortion Act of 1998." As with the Daschle substitute, which the Senate rejected during consideration of H.R. 1122 in 1997 (Record Vote No. 70), the expected Durbin substitute purports to limit certain late-term abortions while in fact leaving the legality of such abortions to the discretion of the abortionist. The likely Durbin amendment is analyzed below.

The Durbin Substitute

The operative portion of Senator Durbin's bill, S. 2497, reads as follows:

Prohibition of post viability abortions

(a) IN GENERAL- It shall be unlawful for a physician to intentionally abort a viable fetus unless the physician prior to performing the abortion--

(1) certifies in writing that, in the physician's medical judgment based on the particular facts of the case before the physician, the continuation of the pregnancy would threaten the mother's life or risk grievous injury to her physical health; and

(2) an independent physician who will not perform nor be present at the abortion and who was not previously involved in the treatment of the mother certifies in writing that, in his or her medical judgment based on the particular facts of the case, the continuation of the pregnancy would threaten the mother's life or risk grievous injury to her physical health.

[. . .]

Definitions

In this chapter:

(1) GRIEVOUS INJURY —

(A) IN GENERAL- The term "grievous injury" means —

(i) a severely debilitating disease or impairment specifically caused by the pregnancy; or
(ii) an inability to provide necessary treatment for a life-threatening condition.

(B) LIMITATION- The term "grievous injury" does not include any condition that is not medically diagnosable or any condition for which termination of pregnancy is not medically indicated.

RPC Analysis of the Durbin Substitute

RPC concludes that, despite its stated purpose, the Durbin substitute would not bar *any* abortions whatsoever:

- Even on its face, the Durbin language would not apply to most partial-birth abortions because the large majority of the procedures are believed to be ***performed during the second trimester*** (see, again, assertions made by abortion lobbyist Ron Fitzsimmons, pp. 6-7 of this Notice). The language in Senator Durbin's amendment regarding "viable" fetuses and "late-term" abortions should be read in light of statements by Senator Daschle (in support of his very similar amendment in the last Congress) to the effect of banning only third- (or final-) trimester abortions: **"Well but, we're talking about the final trimester here. And what we're trying to do is find a way in the final trimester to preclude convenience as a reason for having the procedure done."** [News briefing, 11/26/96] **"An aide to Daschle 'is working with a group of Democrats and Republicans to produce a bill that will ban all late-term abortions . . . . ' Added the aide: 'The Daschle alternative will actually say post-viability abortions, which is generally third trimester . . . .'"** [*White House Bulletin*, 4/30/97]

- While the Durbin bill defines "grievous injury" to the mother (a definition lifted verbatim from the 1997 Daschle substitute), it nowhere defines "viable." While the Durbin bill (*unlike* the earlier Daschle language) requires a second physician to judge whether continuation of the pregnancy would threaten the mother's health, it does not require any judgement of the "viability" of the unborn child other than that of the abortionist himself. Thus, the identification of which fetuses are "viable" — and thus not legally abortable under the Durbin language — would be by someone who has a pecuniary interest in performing the procedure.

- By definition, the Durbin language applies only to "viable" fetuses. This begs the question as to why, if "continuation of the pregnancy would threaten the mother's life or risk serious injury to her physical health," it would be necessary or even allowable to kill an infant capable of sustained life rather than terminate the pregnancy through live delivery.

- The Durbin substitute would require that a finding that "grievous injury" would result from continuation of the pregnancy must be with the concurrence of a second "independent physician who will not perform nor be present at the abortion and who was not previously involved in the treatment of the mother." The second part of this requirement (i.e., that the second physician not be "previously involved in the treatment of the mother") is, for purposes of the bill, a virtual prohibition on involving a family doctor or obstetrician who would be most familiar with the mother's medical condition — certainly a peculiar feature of a measure purportedly meant to ensure the mother's health. On the other hand, the Durbin bill does not define what "independent physician" means; nothing in this language would preclude two clinic operators from each routinely performing the required certification for abortions performed by the other. Finally, some physicians would be willing to make the finding that grievous injury would result in literally all circumstances. As Dr. Warren Hern, a Colorado physician who performs late-term abortions commented on the earlier Daschle amendment (a comment equally applicable to the expected Durbin substitute):

  " 'The Daschle bill can only be seen as an ineffective, tardy, and misguided defensive measure to deflect the Republican momentum,' Hern said. 'I will certify that *any* pregnancy is a threat to a woman's life and could cause grievous injury to her physical health,' he said, referring to the fact that some women die while giving birth." [Bergen County, NJ, *The Record*, 5/14/97, original emphasis]

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